



1200 19th Street NW
Suite 500
Washington, DC 20036
www.z-tel.com

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U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

EX PARTE

December 23, 2002

Marlene H. Dortch
Secretary, Federal Communications Commission
445 12th St., SW
Washington, DC 20554

Re: Texas Detailed Fact-Findings Relevant to Unbundled Switching and UNE
Platform, CC Docket Nos. 01-338, 96-98, and 98-147

Dear Ms. Dortch:

The role of State commissions in establishing unbundled access policy is the subject of a healthy debate in the pending *Triennial Review*. On the one side, the BOCs argue consistently that the FCC must provide a “national pre-emptive framework”. Z-Tel Communications, Inc. (“Z-Tel”), state commissions, consumer **groups**, and others argue that the Commission must preserve the role state commissions are given under the 1996 Act to foster competition in their states.

It **was** precisely rules of nationwide applicability and “unvarying scope” that the D.C. Circuit overturned in the *USTA* decision. The D.C. Circuit stated that promulgating an “undifferentiated national rule for each element” ran afoul of the purposes of the 1996 Act, which called for “a more nuanced concept of impairment” that is attached to “specific markets **or** market categories.”¹ More recently, in the *CompTel* decision, the D.C. Circuit stated that section 251(d)(2), at issue in the *Triennial Review* “seems to invite an inquiry that is specific to particular carriers and **services**.”²

Even before the 1996 **Act**, **State** commissions were actively making such determinations for their own states, and the 1996 Act ushered in a host of new state proceedings. Z-Tel believes that State commissions continue to be best-positioned to undertake this fact-specific inquiry, and

¹ *United States Telecom Association v. FCC*, 290 F.3d 415, 421, 423, 426 (D.C. Cir. 2002).

² *Competitive Telecommunications Association v. FCC*, 2002 U.S. App. LEXIS 22407 (D.C. Cir. 2002) at *9

the Commission would be remiss to dismiss or even ignore State commission fact-findings on the specific issues under debate in the *Triennial Review*.

To demonstrate to the Commission the sheer immensity of the task that the State commissions undertake – and the gargantuan task the BOCs ask this Commission to do in place of the states if their preemption proposals are accepted – Z-Tel hereby files, for the record, a large portion of the record of Texas Public Utility Commission Docket No. 24542. This proceeding began on August 22, 2001 and resulted in a Final Revised Arbitration Award issued on October 3, 2002.³ In this section 252 interconnection agreement arbitration proceeding, the Texas Commission decided, pursuant to federal law and its own state law, that Southwestern Bell Telephone Company (“SWBT”) should be required to provide unbundled access to local switching and UNE Platform on an unrestricted basis.⁴ In particular, the Texas Commission decided that “UNE-P remains a necessary option for CLECs in the Texas market.”

The Texas record contains 11,671 pages, including petitions, testimony, motions, transcripts, hearings, pleadings, proposed, final and revised decisions. Under the authority granted to it by section 252(e)(3) of the 1996 Act (which allows states to “enforc[e] other requirements of State law” in the context of section 252 interconnection agreement arbitrations), the Texas Commission determined that UNE switching and UNE-P should be available pursuant to Texas state law.⁶

After discovery, formal hearings, and briefing, the Texas Commission made the following specific factual findings regarding ULS and UNE-P in Texas:

UNE-P Brings Competition and Choice

- “[L]ocal switching is a vital part of UNE-P, which in turn is an effective vehicle for bringing consumers immediate and long-term benefits of geographically broad-based competition. Therefore, [we] find that requiring local switching to be made available as a UNE in all zones in Texas, without restriction, has competitive merit and is in the public interest.” Award at 89.

³ PUC Docket No. 24542 remains open. Only the record from time of filing of the arbitration petition to the original May 1, 2002 Award is appended hereto, along with the Final Revised Award, dated October 3, 2002, and the Texas Commission’s rejection of SWBT’s motion to abate, dated July 30, 2002. The remainder of the docket is available on the Texas Commission’s web site, <http://interchange.puc.state.tx.us>.

⁴ See, generally, Revised Arbitration Award, PUC Docket No. 24542 (Tex. P.U.C. Oct 3, 2002) (“Award”) (attached) at DPL Issue Nos. 8 and 8a. For the reference convenience of the reader, the several-hundred page Award is the last document in the last box.

⁵ Award at 1.

⁶ See Order No. 24 Denying Motion to Reconsider or Abate, PUC Docket No. 24542 (Tex. P.U.C. July 30, 2002) at 3 (“the findings in the Arbitration Award are based on Texas-specific facts”); Award at 87 (nothing that the “PURA § 60.022(a) allows the Commission to adopt an order relating to the issue of unbundling of local exchange company services in addition to the unbundling required by § 60.021. PURA § 60.022(b) requires the Commission to consider the public interest and Competitive merits before ordering further unbundling. Additionally, P.U.C. SUBST. R. 26.272(a) requires the Commission to ensure that all providers of telecommunications services interconnect in order that the benefits of local exchange competition are realized.”).

- **There** was “unrefuted evidence that UNE-P provided the most, and perhaps only, viable entry strategy for the company to serve rural and suburban zones.” Award at 73.
- UNE-P provides “consumers with the ability to choose alternative providers, lower prices, higher quality, and innovative service packaging due to the presence of competitive pressure; and more infrastructure investment in the next generation, digital, packet-based, high-bandwidth network.” Award at 87.
- There is “compelling the evidence that UNE-P is the only viable market entry mechanism that readily scales to varying sized exchanges to serve the mass market, while minimizing capital outlays and permitting a CLEC to gain a foothold.” Award at 87-88.
- “UNE-P is the only viable option for providing competitive analog local service to small business customers.” Award at **88**.
- “Resale gives CLECs little or no means to differentiate themselves from SWBT, while UNE-P provides CLECs with a meaningful opportunity to differentiate their products and services to consumers.” Award at **88**.

Alternative Wholesale Providers of Switching Not Present in Texas

- No wholesale providers of unbundled switching were “ubiquitously available” in Texas. The Texas Commission stated that “both SWBT and the CLECs presented clear cut evidence that no non-ILEC switch-based provider offers wholesale local switching in any market in Texas.” Award at 73.
- There are “operational barriers and economic barriers” to **use** of “non-SWBT wholesale switching providers or self-provisioning.” Award at **88**.
- With regard to SBC’s ability to support a wholesale switching market, the Texas Commission noted that it was “concerned with SWBT’s clear lack of preparation to integrate in any administratively practical **or** meaningful way local switching obtained by a CLEC from a third-party with SWBT’s network.” Award at 73-74.
- “[T]he record reflects an absence of both the willingness and ability of any switch-based CLEC to serve **as** a wholesale switching alternative to SWBT provisioned **LS** [local switching]. Finally, the EEL or self-provided local switching **can** be **cost** prohibitive, particularly **for two-wire voice grade** customers.” Award at **88**.
- “[T]he delay and expense associated with deploying facilities and capturing a significant scale of customers using their own facilities remains a time-consuming process for CLECs that takes years.” Award at 73.
- “[F]ixed infrastructure costs — including the switch itself, electronic interfaces, collocation arrangements, provisioning, and cutovers — associated with providing

service to residential and small business customers remain a barrier to market entry unless the CLEC is able to generate sufficient economies of scale in a given market, which is achieved in part through serving large business customers through UNE-P. Award at 73.

- “CLECs in Texas would be impaired without unbundled local switching from the ILEC.” Award at 74-75.

Current FCC Three-Line Rule Inadequate for Texas

- In implementing three-line ULS rule, “the FCC relied at least ~~in~~ **part** on a letter submitted by Ameritech indicating that, in September 1999, the market segment for business customers with three lines or less accounted for approximately 72% of Ameritech’s business customer base.” The Texas Commission noted that it was “reluctant to rely solely on this 2½-year old letter to determine whether or not to require SWBT to provide ULS in Texas. First, owing to the manner in which the FCC gathers information, there are evidentiary questions that would arise if the letter was introduced in this proceeding.” Award at 70.

UNE-P Promotes Innovation and Efficient Investment

- “[A] lack of non-ILEC ULS would hinder the rapid deployment of facilities, as well **as** investment in innovative technologies **and** product offerings.” Award at 74.
- “[T]he continued availability of UNE-P and all of its components **will** also facilitate CLEC creation of innovative product offerings. Such a policy continues the benefit of customer choice in service providers and service packaging to a large geographic segment of the population.” Award at **88**.
- “[C]ontinued duplication of the existing legacy analog network may constitute **an inefficient use** of scarce industry resources. Inefficient use **of** available resources is not in the public interest.” Award at 89.
- “[T]he continued availability of UNE-P will allow competitive market forces to provide better guidance and incentive for carriers to make sound and prudent investment decisions regarding the type of technologies to be deployed prospectively.” Award at 89.

In conclusion, the Texas Commission ruled **that** “even if in its Triennial **UNE Review proceeding** the FCC were to remove local switching from the national list, or create a new exception standard, [we] nonetheless find that on this specific factual record **CLECs** in Texas would be impaired without the availability of local switching on an unbundled basis.” Award at 72-73.


The findings above merely scratch the surface of the decisions made in Docket No. 24542. Fifty-seven issues were submitted to arbitration, including rates, **terms** and conditions related to unbundled switching, the availability **of** EELs, and the treatment **of** alternatively billed

calls. These are the nitty-gritty issues **of** local competition, and State commissions across the country have engaged in fact-based proceedings of similar scope in the last six years.

The facts found and conclusions drawn by the Texas Commission have direct bearing on the ***Triennial Review***. After **a** thorough examination of Texas-specific facts, the Texas Commission found that no wholesale alternatives for mass-market switching existed because of “operational barriers and economic barriers.” As Z-Tel **has** previously discussed in this proceeding,⁷ solving those operational and economic impairments are crucial pre-conditions to any conclusion regarding the viability or existence of wholesale options to ILEC-provided unbundled switching and shared transport. As result, Z-Tel believes **that** the Texas Commission findings (and similar decisions by other states) warrant full consideration, discussion, and deference in **this** proceeding.

Sincerely,



Thomas M. Koutsky 
Z-Tel Communications, Inc.

cc: with attachments **(4** boxes):

Chairman Michael Powell
Commissioner Michael Copps
Commissioner Kevin J. Martin
Commissioner Kathleen Q. Abemathy
Commissioner Jonathan Adelstein
William Maher, Chief, Wireline Competition Bureau
John Rogovin, Deputy General Counsel, OGC
Jeffrey Carlisle, Wireline Competition Bureau
Michelle Carey, Wireline Competition Bureau
Robert Tanner, Wireline Competition **Bureau**

cc: without attachments:

Christopher Libertelli, Office of the Chairman
Jordan Goldstein, Office of Commissioner Copps
Daniel Gonzalez, Office of Commissioner Martin
Matthew **Brill**, Office of Commissioner Abernathy
Lisa Zaina, Office of Commissioner Adelstein

⁷ *Ex Parte* Letter from Christopher J. Wright, ~~Harris~~ Wiltshire & Grannis, to Marlene H. Donch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, and 98-147 (Nov. 21, 2002).